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No. 90-644

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In The

Supreme Court of the United States

October Term, 1990

JAMES G. LEDBETTER, COMMISSIONER,
GEORGIA DEPARTMENT OF HUMAN RESOURCES,

Petitioner,

v.

MARTA O. TURNER, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the eleventh circuit correctly held that the petitioner cannot violate federal regulations that require adequate and timely notice of termination of AFDC and subsequently charge respondents with overpayments.

2. Whether the eleventh circuit correctly held that the district court's injunction against the recoupment of AFDC benefits paid to respondents does not violate the eleventh amendment.

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents, MARTA TURNER and the class of AFDC recipients she represents, respectfully ask this Court to deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. That opinion is reported as *Turner v. Ledbetter*, 906 F.2d 606 (11th Cir. 1990).

REGULATORY PROVISIONS

In addition to the statutes cited by petitioner, respondents refer the Court to the following federal regulations.

45 C.F.R. § 205.10(a)(4)(i)(A), (B):

> In cases of intended action to discontinue, terminate, suspend or reduce assistance . . . (i) The State or local agency shall give timely and adequate notice, . . . (A) "Timely" means that the notice is mailed at least 10 days before the date of the action, that is, the date upon which the action would become effective; (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing. . . .

45 C.F.R. § 205.10(a)(6)(i):

> If the recipient requests a hearing within the timely notice period: (i) Assistance shall not be suspended, reduced discontinued or terminated (but is subject to recovery by the agency if its

action is sustained), until a decision is rendered after a hearing. . . .

45 C.F.R. § 206.10(a)(2)(i):

Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program, and related services available, and the rights and responsibilities of applicants for and recipients of assistance.

STATEMENT OF THE CASE

This is an action brought by current and former recipients of Aid to Families with Dependent Children (AFDC) challenging the State of Georgia's implementation of the federal lump sum penalty provision of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 845 (1981). Under the lump sum penalty the state divides the amount of any lump sum of money received by an AFDC recipient by the state standard of need, and disqualifies the AFDC recipient for the resulting number of months. 42 U.S.C. § 602(a)(17), 45 C.F.R. § 233.20 (a)(3)(ii)(F). Respondents filed suit on three issues:

1. Whether they were entitled to advance written notice of the lump sum penalty. 45 C.F.R. § 206.10(a)(2)(i);

2. Whether the individual written notices of termination received by respondents after they reported the receipt of a lump sum were adequate pursuant to 45 C.F.R.

§ 205.10(a)(4)(i)(A),(B) or the Fourteenth Amendment to the United States Constitution; and

3. Whether petitioner's practice of automatically terminating Medicaid assistance when AFDC was terminated due to the receipt of a lump sum was proper pursuant to 42 U.S.C. § 1396a(a)(10) and 42 C.F.R. § 435.916(c).

The first issue was ultimately determined adversely to the respondents after this Court's ruling in *Gardebring v. Jenkins*, 485 U.S. 415 (1988). This Court held that AFDC recipients are not entitled to an advance written mass notice of the lump sum penalty. *See also, Atkins v. Parker*, 472 U.S. 115 (1985).

On the remaining two issues the district court ruled for the respondents. The district court held that the individual notices sent to the respondents terminating their AFDC were inadequate under the regulations requiring adequate and timely notice of termination of AFDC benefits at 45 C.F.R. § 205.10(a)(4)(i)(A), (B). "The Court has already decided that the computer generated notices are inadequate, confusing, and sometimes misleading." District court's order of March 30, 1989, pg. 17a Petition for Certiorari. The district court further decided under *Schweiker v. Gray Panthers*, 453 U.S. 34 (1981), that the petitioner's Medicaid termination policies were illegal and ordered the state's policy and practice to conform to the federal statute and regulations. 42 U.S.C. § 1396a(a)(10); 42 C.F.R. § 435.916(c). The petitioner did not appeal the district court's rulings on these last two issues.

As relief the district court ordered the petitioner to change his policies regarding individual notice at the termination of AFDC. The individual notices must show the calculations of the AFDC recipient's lump sum penalty, explain why the recipient was terminated, how long she will be disqualified, and advise her when she can reapply for benefits. The district court further ordered the petitioner to change the state Medicaid termination policy manual to assure that a separate Medicaid eligibility determination is made for recipients when AFDC is terminated, as required by the Medicaid regulations. The district court also required notice of the lawsuit to be sent to class members pursuant to *Quern v. Jordan*, 440 U.S. 332 (1979). The district court also ordered that the petitioner train caseworkers to assure that the new procedures were properly implemented.

Finally, the district court held that the petitioner's failure to provide adequate notices as required by the federal AFDC regulations meant that the AFDC terminations were not legal and proper. The district court therefore held that the petitioner had not lawfully terminated AFDC and Medicaid benefits and no overpayments had occurred. As a result the petitioner was barred prospectively from reducing future AFDC grants to collect the alleged overpayments paid to respondents. This single relief question is the only issue the petitioner appealed to the eleventh circuit and the only issue pending before this Court. The district court specifically recognized that the eleventh amendment barred the court from ordering illegally terminated benefits returned to respondents or from requiring the petitioner to return the alleged overpayments wrongfully collected.

The eleventh circuit, in affirming the district court, held that the relief ordered by the district court was appropriate. The court held that because there was no proper termination of AFDC benefits, the respondents were not overpaid and *do not owe any money to the state.* The eleventh circuit decided that while the eleventh amendment bars the federal courts from awarding compensatory damages from the state treasury, the amendment does not bar prospective injunctive relief which requires state officials to conform their policy to federal law as in this case.

REASONS FOR DENYING THE WRIT

I. THIS IS NOT A MATTER OF SPECIAL IMPORTANCE FOR THE UNITED STATES SUPREME COURT TO DECIDE.

A. The One Remaining Relief Issue In This Case Is Not A Matter That Requires The Time And Resources Of The Supreme Court

After years of discovery to determine class members, the only person that petitioner ever identified with any substantial alleged overpayment was the named plaintiff, Marta Turner. Ms. Turner continued to receive benefits after the state's attempted termination of her benefits because she knew to appeal within ten days of the receipt of her notice of termination. Her total alleged overpayment was $1,152. While this is a substantial amount for Ms. Turner, it does not seem to be a matter that would require the time and resources of the United States Supreme Court.

AFDC regulations provide that if a recipient requests a timely hearing within ten days of receiving a termination notice, her AFDC benefits cannot be terminated. "Assistance shall not be suspended, reduced, discontinued or terminated (but is subject to recovery by the agency *if its action is sustained*) until a decision is rendered after a hearing, . . . " 45 C.F.R. § 205.10(a)(6)(i) (emphasis added).

In Ms. Turner's case, the agency action was not sustained by either court that considered it. The petitioner's termination procedures were found inadequate and unlawful and the petitioner was ordered to correct those procedures. Significantly, the petitioner did not appeal any of the substantive rulings requiring the changes in his AFDC and Medicaid notice procedures.

Petitioner argues that under the regulations he is required to collect all overpayments from AFDC recipients. 42 U.S.C. § 602(a)(22); 45 C.F.R. § 233.20(a)(13). However, both the district court and the eleventh circuit have determined that Ms. Turner did not receive an overpayment. The regulations do not define the money respondent received during her appeal as an overpayment because the petitioner's actions were not sustained. His policies were declared unlawful and he did not appeal that decision to the eleventh circuit or to this Court.

B. No Split Of Authority Exists Among The Circuits Regarding The Relief To Which An AFDC Recipient Is Entitled If The State Does Not Provide Adequate And Timely Notice As Required By Federal Regulations

The Supreme Court rules state that the Court will take cases upon Petition for Certiorari only when there

are special and important reasons for an issue to be decided by the United States Supreme Court. One of those special and important reasons is when a conflict exists between two United States circuit courts of appeal. Sup. Ct. R. 10.1.(a), *National Ass'n. of Greeting Card Pub. v. U.S. Postal Service*, 462 U.S. 810 (1983).

Petitioner argues that a split of authorities exists among the circuits regarding the effect of a court's finding that the state's notice procedures are inadequate. However, the petitioner does not cite to any case that has held the state can violate the individual notice regulations at 45 C.F.R. § 205.10(a)(4)(i)(A) and (B) and still effectively terminate AFDC.

Petitioner relies on one case that he argues shows a conflict "in principle" on the issue of relief. *Foggs v. Block*, 722 F.2d 933 (1st Cir. 1983), *rev'd sub nom. Atkins v. Parker*, 472 U.S. 115 (1985). Petitioner asserts that *Foggs* is in conflict with the line of cases from *Goldberg v. Kelly*, 397 U.S. 254 (1970), *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979), *cert. denied sub nom. Buck v. Kimble*, 444 U.S. 950 (1979) to *Turner, supra*. *Foggs*, later in this Court *Atkins*, did not consider the rights of an individual recipient to receive notice on the termination of her benefits. In *Foggs*, a food stamp case, the first circuit determined the validity of a mass notice that the state sent after a change in food stamp legislation. *See*, 7 C.F.R. § 273.13(b)(1). The requirement to provide mass notices to applicants regarding information about the program or after a legislative change is clearly distinguishable from the obligation of the state to provide individual notices of termination before the state can discontinue an individual recipient's benefits.

On petition for certiorari this Court recognized the distinction between these two different types of notices. This Court looked at the notice regulations drawing a clear "distinction between the requirement of notice in advance of an 'adverse action' based on the particular facts of an individual case, on the one hand, and the absence of any requirement of individual notice of a 'mass change,' on the other." *Atkins*, 472 U.S. at 125. In *Atkins* the Supreme Court decided that the mass notice of legislative changes in the food stamp program was not required. In contrast, the individual notice requirements that are at issue in *Turner*, were upheld by the district court and the eleventh circuit and were not appealed to this Court by the petitioner

The circuit courts have consistently held, since this Court's ruling in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that due process requires an adequate and timely notice prior to the termination of AFDC. Moreover, the courts have consistently held that an improper or illegal individual notice will bar an attempted termination of benefits, even though a substantive rule might have been used against the recipient had proper notice been provided. *Buckhanon v. Percy*, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Kimble v. Solomon*, 599 F.2d 599 (4th Cir. 1979), *cert. denied sub nom. Buck v. Kimble*, 444 U.S. 950 (1979); *Caldwell v. Wallace*, 755 F.2d 870 (11th Cir. 1985). Otherwise, the guarantees of the due process clause of the Constitution and the notice statutes and regulations are illusory. Thus, there is no conflict between the circuits on the issue presented by this case.

II. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE PETITIONER COULD NOT VIOLATE FEDERAL REGULATIONS WHICH REQUIRE ADEQUATE AND TIMELY NOTICE OF TERMINATION OF AFDC AND SUBSEQUENTLY CHARGE RESPONDENTS WITH OVERPAYMENTS.

The eleventh circuit, in affirming the district court, held that because of the ineffective notice the respondents did not receive an overpayment. To allow the state to collect these alleged overpayments "as the state urges, would frustrate the federal regulations by allowing the state to violate the federal regulations requirement of adequate notice and at the same time claim to have legally terminated AFDC recipients." *Turner*, 906 F.2d at 609.

This issue of relief is governed by this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg* no one disputed the validity of the underlying regulation. The state of New York asserted that the AFDC recipients had violated specific AFDC regulations. The state alleged that one of the plaintiffs had concealed her employment, a clear violation of the AFDC regulations. Another plaintiff in *Goldberg* was accused of not reporting that her husband lived with her and had income, also a clear violation of the AFDC regulations. Nevertheless, the court held "the issue is not whether a specific termination was proper, but whether the procedures used were justifiable." *Kelly v. Wyman*, 294 F.Supp. 893, 900 (S.D.N.Y. 1968), *aff'd sub nom. Goldberg v. Kelly*, 397 U.S. 254 (1970). This Court held that to terminate benefits the state must provide the recipients with adequate and timely notice. These notice requirements were later incorporated into

statute and regulations requiring and defining adequate and timely notice. 42 U.S.C. § 602(a)(4), 45 C.F.R. § 205.10(a)(4)(i)(A),(B).

A termination notice in a lump sum penalty case is critically important because the recipient is expected to plan her family's budget for the next few months based on the notice. She must know how long her penalty period will last for her to plan to use her lump sum for her living expenses. This Court held in *Gardebring v. Jenkins, supra,* that advance written notice of the rule itself was not required. This makes the individual notice to the recipient all the more important.

The only case that petitioner cites for his proposition that the state can fail to provide adequate notice and still have lawfully terminated benefits is the first circuit decision in *Foggs v. Block,* 722 F.2d 933 (1st Cir. 1983), *rev'd on other grounds, sub nom. Atkins v. Parker,* 472 U.S. 115 (1985). As discussed above, *Foggs* considered the adequacy of a mass change notice regulation, not the individual notice to food stamp recipients at the termination of their benefits. The Supreme Court in *Atkins* eventually held that the mass notice was not required under the food stamp regulations. "This case, however, does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a large legislatively mandated substantive change in the scope of the entire program." *Atkins,* 472 U.S. at 129. The procedural fairness of individual eligibility determinations is exactly what *Turner* involved. The substantive legal issue was decided against the recipients in *Atkins* and therefore the issue of relief was not decided. *Atkins* is not precedent or authority for the type of relief ordered in *Turner,* and presents

no conflict of authority upon which to base this Petition for Certiorari. The petitioner points to no case that holds that the state can ignore the individual notice regulations with impunity. Rather, the cases consistently hold that an ineffective notice will bar the termination of benefits, even though a substantive rule might have otherwise been used against the recipient.

Likewise, in *Gardebring v. Jenkins, supra,* the issue was not individual notice at the termination of benefits as in *Turner.* The issue in *Gardebring* was whether all AFDC applicants or recipients were entitled to advance written notice of a mass change in the AFDC regulations pursuant to 45 C.F.R. § 206.10(a)(2)(i). That very broad regulation raised in *Gardebring* says that "[a]pplicants shall be informed about the eligibility requirements and their rights and obligations under the program." The Supreme Court determined that 45 C.F.R. § 206.10(a)(2)(i) did not require that recipients be advised in advance about the lump sum penalty.

In comparison, the notice regulations the courts found petitioner had violated in *Turner* were clear and specific requirements of individual notice.

> In cases of intended action to discontinue, terminate, suspend or reduce assistance . . . (i) The State or local agency shall give timely and adequate notice, . . . (A) "Timely" means that the notice is mailed at least 10 days before the date of the action, that is, the date upon which the action would become effective; (B) "Adequate" means a written notice that includes a statement of what action the agency intends to take, the

> reasons for the intended agency action, the specific regulations supporting such action, explanation of the individual's right to request an evidentiary hearing. . . .

45 C.F.R. § 205.10(a)(4)(i)(A), (B).

Both *Atkins* and *Gardebring* considered the requirements of mass change notice regulations. In both cases this court found the mass notices were not required. Neither case is authority for the substantive issues nor the relief ordered in *Turner*.

Nor is *Schweiker v. Hansen*, 450 U.S. 785 (1981), in any way relevant to this case. This case was not brought before the district court on the issue of the individual error of a caseworker as in *Schweiker*. *Schweiker* involved one caseworker giving out erroneous information. The Court held the government was not estopped from applying the Social Security regulations because of the erroneous advice of a government worker. In *Turner* the entire state policy was found illegal. The policy manuals had to be rewritten and training for caseworkers on the new procedures was ordered.

Petitioner implies that Ms. Turner, as Ms. A, received more than her entitlement of public benefits because she appealed and had her benefits continued during her appeal. Compared to the other class members, Ms. Bs, whose benefits were terminated, Ms. Turner was indeed lucky that she knew to appeal to continue her AFDC. However, she was not receiving anything to which she was not entitled. Petitioner's admitted illegal policies caused grievous harm to the families he is entrusted to assist. Because these AFDC recipients were not given adequate notice telling them they would be cut off AFDC,

they used the lump sum money they received to meet the basic needs for themselves and their families. In most cases, AFDC families learned they would not receive AFDC only when their next month's check did not arrive. The respondent class had no money and no medical assistance. Petitioner's illegal policies placed the most vulnerable in our society, poor mothers and children, in dire life-threatening circumstances. Now he asserts that because one family did not suffer to the same extent as the others because of his policies, there is an injustice. The injustice would occur if petitioner were now allowed to take action against these recipients and terminate or reduce their AFDC checks to recoup these alleged overpayments, despite the state's violation of the adequate and timely notice regulations.

III. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT'S INJUNCTION AGAINST THE RECOUPMENT OF AFDC PAID TO RESPONDENTS DOES NOT VIOLATE THE ELEVENTH AMENDMENT

The petitioner here seeks to expand the eleventh amendment beyond anything this Court has previously held. The petitioner argues that although his policies were held illegal he can collect these monies from the respondents because to prohibit him from doing so would affect the public fisc and is therefore barred by the eleventh amendment.

In his order of March 30, 1988, the district court judge enjoined the petitioner from recouping money from respondents. The eleventh circuit affirmed this action as

prospective injunctive relief which may have had an ancillary effect on the state treasury. Such an ancillary effect is allowed to require state officials to shape their official conduct to the mandate of a court decree.

Edelman v. Jordan, 415 U.S. 651 (1974), holds that the eleventh amendment prohibits the federal courts from ordering the "*payment of state funds*, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation . . . measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." 415 U.S. at 668. (emphasis added)

In *Turner* there was no order for the *payment of state funds*. No one has ordered the state to pay out any money to the respondents. Petitioner has simply been ordered not to reduce future AFDC benefits because the court found, and petitioner did not appeal, that he had not given respondents proper termination notices.

The district court recognized the restraints of *Edelman* and the Supreme Court's interpretations of the eleventh amendment. The court, mindful of *Edelman*, did not order petitioner to pay back benefits to any of the class members monies that they lost as a result of the illegal termination of their AFDC benefits. Rather, the court strictly tailored an order that prohibited the petitioner from taking future action to recover the AFDC overpayments charged to class members by the petitioner. The district court's injunction was an order for future compliance with the district court's determination that the petitioner

had not properly terminated benefits. Accordingly, the eleventh amendment is not implicated in *Turner*.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Turner v. Ledbetter* should be denied.

Respectfully submitted,

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